

Physical Damage, Water Exclusion, Products-Completed Operations Exclusion Coverage Update

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Physical Damage – Northern District of Illinois (Illinois Law)

Sandy Point Dental, PC v. Cincinnati Ins. Co.

20-cv-2160, 2021 WL 83758 (N.D. Ill. Jan. 10, 2021)

The U.S. District Court for the Northern District of Illinois denied an insured's motion to reconsider and for leave to file a second amended complaint after previously holding that Sandy Point Dental, PC (Sandy Point) was not entitled to insurance coverage from The Cincinnati Insurance Company (Cincinnati) for alleged physical damage caused by the COVID-19 virus. In the court's previous Sept. 21, 2020 opinion, it held that the relevant Cincinnati insurance policy was triggered "only by a direct physical loss, and that the COVID-19 pandemic and subsequent lockdown orders did not cause such a loss." The court reasoned that, under Illinois law, COVID-19 did not physically "alter the appearance, shape, color, structure, or other material dimension" of Sandy Point so as to constitute direct physical loss, as required for property-damage coverage under the Cincinnati insurance policy.

Sandy Point argued that the court should reconsider its decision because there had been a recently decided Missouri federal court case that Sandy Point considered "a change in the law." They cited the Missouri federal case which held that "the COVID-19 virus physically attached itself to the premises, causing physical damage or loss to the property, and thus triggered insurance coverage." The court, however, held that the recent Missouri federal case is "nothing new," stating that the Cincinnati policy language was less expansive than the policy language in that case. Further, the court noted that a majority of courts have found that "COVID-19 and corresponding closure orders do not cause physical damage or physical loss to insured property."

The court further denied the plaintiff's proposed second amended complaint, which added eight paragraphs "that essentially state that the COVID-19 virus spreads through particles that land on surfaces and physically attaches itself to physical premises." The court noted that these allegations "do

not correct the deficiencies in plaintiff's original complaint" because there were "no allegations that COVID-19 was ever present in the facility and no allegations of tangible physical damage." Even if COVID-19 had been present at the facility, that alone "is not sufficient to present a claim based on direct physical damage to the property."

Water Exclusion – Illinois

Wells v. State Farm Fire & Cas. Ins. Co.

2021 IL App (5th) 190460, 2021 WL 21782 (Ill. App. Ct. Jan. 4, 2021)

The Illinois Court of Appeals upheld the circuit court's judgment in favor of State Farm Fire and Casualty Insurance Company (State Farm) following a bench trial. The insureds sought coverage under their casualty insurance policy issued by State Farm for property damage caused by burst water pipes in a vacant building they owned. Following State Farm's coverage denial, the insureds filed suit for declaratory judgment, breach of contract, and bad faith claims practices.

During the bench trial, there was testimony that the building's water pipes froze and burst on three prior occasions. Each time, a circuit breaker tripped, causing the furnace to fail and the pipes to freeze and burst. Sometime thereafter, the building's heat pump was stolen, which resulted in the insureds disconnecting water service to the building. However, in January 2011, the insureds resumed water service in order to conduct construction on the building. Knowing the furnace system was inadequate to prevent the pipes from bursting, the insureds placed three space heaters near the water pipes that they would turn on when temperatures dropped. In February 2011, the insureds discovered that the pipes had burst, causing water damage to portions of the building.

The appellate court upheld the trial court's ruling that there was no coverage for the insureds' claim due to the applicability of an exclusion that precluded coverage for "water that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by freezing unless: (1) you do your best to maintain heat in the building or structure." The appellate court interpreted the "do your best" exception to mean that the insureds were required to use "reasonable efforts" to maintain heat in the building. The evidence presented at trial showed that the insureds did not use "reasonable efforts" as they restored water service, in the middle of winter, knowing that the furnace was inadequate to protect the pipes from freezing, but did not make any effort to repair or replace the furnace. Based on the record presented, the appellate court concluded that the trial court was entitled to find that the insureds did not meet their burden of proving the exception to the water exclusion applied.

Products-Completed Operations Exclusion – Western District of Missouri (Missouri Law)

Scottsdale Ins. Co. v. Aqueous Vapor, LLC

4:20-00328-CV-RK, 2021 WL 123401 (W.D. Mo. Jan. 12, 2021)

The U.S. District Court for the Western District of Missouri held that Aqueous Vapor, LLC (Aqueous Vapor) and Adam Williams (Williams) were not entitled to insurance coverage from Aqueous Vapor's insurer, Scottsdale Insurance Company (Scottsdale). In the underlying action, Williams claimed he was injured after a battery he purchased from Aqueous Vapor exploded in his pocket after leaving Aqueous Vapor's premises. The Scottsdale policy included a products-completed operations exclusion, which precluded coverage for "bodily injury occurring away from the premises owned or rented by Aqueous Vapor and arising out of their product or work."

Williams first argued that the policy was illusory because the primary purpose of a CGL policy is "to protect the insured against losses to third parties arising out of the operation of the insured's business." The court found this argument unpersuasive, stating that Williams' alleged injuries arose out of a defect in Aqueous Vapor's product, and "Missouri also recognizes that [Commercial General Liability policies] are not intended as a guarantee of the quality of an insured's product or work." Williams further argued that the policy's exclusions "transform the policy into nothing more than a premises liability policy." The court again found this argument unpersuasive, noting that Williams provided limited analysis in his argument, that such exclusions are common, so, therefore, the court "cannot determine on these facts that the Policy amounts to such."

Finally, Williams argued that Scottsdale is required to defend the underlying suit because Williams alleged negligent misrepresentation under the Missouri Merchandising Practices Act (MMPA), constituting an "occurrence." The court rejected this argument, reasoning that even if there were an occurrence, the products-completed operations exclusion bars coverage for Williams' alleged injuries based on its plain language. Thus, the court granted Scottsdale's motion for summary judgment, holding that Scottsdale had no duty to defend or indemnify Aqueous Vapor in the underlying suit.

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